

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS**

**Case No. 02-4085-JAR**

## MEMORANDUM & ORDER

Plaintiff Craig E. McLean brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of Defendant Commissioner of Social Security's denial of his application for a period of disability and disability insurance benefits under Title II of the Social Security Act. According to plaintiff, defendant failed to properly assess plaintiff's credibility, failed to accord adequate weight to the physicians' opinions, failed to give adequate weight to the Veteran's Administration's disability determination, and failed to establish that plaintiff could perform his past relevant work. As explained in more detail below, the Court concludes that the decision, in part, is not based on substantial evidence and/or on an incorrect application of the law, and therefore the Court remands this case.

## I. Procedural Background

On July 20, 1999, plaintiff filed his application for a period of disability and disability insurance benefits, claiming disability since April 1, 1996, due to Graves' Disease, Graves' Ophthalmopathy, and chronic obstructive pulmonary disease (COPD). The application was denied

both initially and upon reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing on September 29, 2000, at which both plaintiff and his counsel were present. On December 26, 2000, the ALJ rendered a decision denying all benefits, on the basis that plaintiff was not under a "disability" as defined by the Social Security Act. After the ALJ's unfavorable decision, plaintiff requested review by the Appeals Council; his request for review was denied on April 24, 2002. Thus, the ALJ's decision is the final decision of defendant.

## **II. Standard of Review**

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant's decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.<sup>1</sup> The Tenth Circuit has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>2</sup> In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.<sup>3</sup>

## **III. Relevant Framework for Analyzing Claim of Disability and the ALJ's Findings**

"Disability" is defined in the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ."<sup>4</sup> The Social Security Act further provides that an individual "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only

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<sup>1</sup>See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

<sup>2</sup>*Id.* (quoting *Castellano*, 26 F.3d at 1028).

<sup>3</sup>*Id.*

<sup>4</sup>*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .”<sup>5</sup>

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,<sup>6</sup> and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.<sup>7</sup> Step one determines whether the claimant is presently engaged in substantial gainful activity.<sup>8</sup> If he is, disability benefits are denied.<sup>9</sup> If he is not, the decision maker must proceed to the second step.<sup>10</sup> Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has a medically severe impairment or combination of impairments.”<sup>11</sup> This determination is governed by certain “severity regulations,” is based on medical factors alone, and consequently, does not include consideration of such vocational factors as age, education, and work experience.<sup>12</sup> Pursuant to the severity regulations, the claimant must make a threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic

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<sup>5</sup>*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

<sup>6</sup>*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. 2287, 2291 (1987)).

<sup>12</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

work activities.<sup>13</sup> If the claimant is unable to show that his impairments would have more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits.<sup>14</sup>

If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the decision maker proceeds to step three.<sup>15</sup> The ALJ in this case concluded that plaintiff satisfied the severity requirement based on the fact that he has: Graves' Disease, with involvement of the extraocular muscles; a corneal abrasion; and diplopia—double vision treated by muscle surgery and wearing one black lense on plaintiff's glasses. Thus, the ALJ proceeded to step three.

In step three, the ALJ “determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity.”<sup>16</sup> If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.<sup>17</sup> If not, the evaluation proceeds to the fourth step, where the claimant must show that the “impairment prevents [the claimant] from performing work he has performed in the past.”<sup>18</sup> If the claimant is able to perform his previous work, he is not disabled.<sup>19</sup> With respect to the third step of the process in this case, the ALJ determined that plaintiff's impairments were not listed or medically equivalent to those listed in the relevant regulations. At the fourth step, the ALJ

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<sup>13</sup>*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

<sup>14</sup>*Id.* at 751.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

<sup>19</sup>*Id.*

determined plaintiff's residual functional capacity (RFC) and concluded that plaintiff was able to perform his past relevant work of video store clerk or laundromat operator. Therefore the ALJ did not move to the fifth step which is determining whether the claimant has the RFC "to perform other work in the national economy in view of his age, education, and work experience."<sup>20</sup>

#### **IV. Analysis of Plaintiff's Specific Arguments**

Plaintiff contends that the ALJ erred: in failing to accord adequate weight to the disability determination of the Department of Veterans Affairs (VA); in finding plaintiff's testimony not credible; in failing to accord adequate weight to the physicians' opinions; and in determining that plaintiff could return to his past work. The Court addresses each of these arguments in turn.

##### *A. Plaintiff's Award of Benefits from the Department of Veterans Affairs*

Plaintiff argues that the ALJ did not give adequate weight to the VA's determination and award of disability benefits to him. In the Tenth Circuit, the ALJ must consider the claimant's disability rating by the VA which, "although not binding on the Commissioner, is 'entitled to weight and must be considered.'"<sup>21</sup> Although the Tenth Circuit has not stated what weight a VA disability determination should receive, it is clear that it should receive some weight, and a passing reference will not suffice.<sup>22</sup> In this case, the ALJ's decision includes three references to plaintiff's receipt of VA benefits. The ALJ noted that Plaintiff received about \$2153 in monthly VA benefits. The ALJ noted that plaintiff's receipt of VA benefits for "Graves' Disease and attending visual limitations. . . . diminishes a financial need to return to work." And the ALJ again noted that

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<sup>20</sup>*See id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. at 2291).

<sup>21</sup>*Hamlin v. Barnhart*, No. 02-7087, 2004 WL 945110 at \*7 (10th Cir. May 4, 2004) (quoting *Baca v. Dep't of Health & Human Servs.*, 5 F.3d 476, 480 (10th Cir. 1993)).

<sup>22</sup>*Richter v. Chater*, 900 F. Supp. 1531, 1539 (D. Kan. 1995).

plaintiff's receipt of the benefits meant that "he may not have a significant financial motivation to return to work." The ALJ's only consideration of the VA benefits was with respect to the benefits being a source of income affecting plaintiff's motivation of work.

The ALJ did not consider or give any weight to the VA's determination of disability: in 1992 the VA found plaintiff 40% disabled; and in 1999 the VA found plaintiff 70% disabled. While the Tenth Circuit found it proper to not give great weight to a twenty percent VA disability rating,<sup>23</sup> to ignore, without explanation, a disability determination of 70%, is improper. In comparison, this Court found no error in an ALJ giving no weight to a 100% VA disability rating, when the ALJ explained at some length why he rejected the VA determination.<sup>24</sup> But the ALJ offered no explanation for disregarding the VA disability determinations in 1992 and 1999.

The ALJ mentioned that the VA found plaintiff disabled for "Graves' Disease and attending visual problems," however the VA had increased plaintiff's disability status in 1999 because it found his Graves' Disease symptoms to be advancing beyond visual limitations. In the 1999 VA rating decision, in discussing plaintiff's Graves' Disease, the reviewer noted that "[t]he recent exam found some headaches and increased T4 and FTI lab results outside the normal range. The effects on vision combine with the fatigability [sic] and elevated blood pressure to support a higher 60% evaluation." Plaintiff also had a 10% disability based on sinusitis, which made his overall disability 70% percent. On remand, the ALJ should discuss plaintiff's disability rating from the Department of Veterans Affairs and the weight to which that determination is entitled.

*B. Assessment of Plaintiff's Credibility*

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<sup>23</sup>*Musgrave v. Sullivan*, 966 F.2d 1371, 1375 (10th Cir. 1992).

<sup>24</sup>*McQueeney v. Barnhart*, No. 03-2338, 2004 WL 34877 at \*6 (D. Kan. Jan. 5, 2004).

Plaintiff further contends that in determining his RFC, the ALJ improperly assessed the credibility of plaintiff's complaints of fatigue. When assessing credibility, the ALJ must consider the three prong test set out in *Luna v. Bowen*.<sup>25</sup> The ALJ properly determined the first two prongs: plaintiff has an impairment and there is a loose nexus between the alleged symptoms and the impairment.<sup>26</sup> The third prong of the *Luna* test asks whether the symptoms are in fact disabling, considering all the evidence presented, including medical data, objective indications of the degree of symptoms, and subjective accounts of severity of symptoms by the claimant.<sup>27</sup> In addition to objective medical evidence, at this third step the ALJ is to consider:

1. [t]he individual's daily activities; 2. [t]he location, duration, frequency, and intensity of the individual's pain or other symptoms; 3. [f]actors that precipitate and aggravate the symptoms; 4. [t]he type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; 5. [t]reatment, other than medication, the individual receives or has received for relief of pain or other symptoms; 6. [a]ny measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and 7. [a]ny other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.<sup>28</sup>

The ALJ may also consider such factors as a claimant's persistent attempts to find relief and willingness to try any treatment prescribed, regular contact with a doctor, and subjective measures of credibility that are peculiarly within the judgment of the ALJ.<sup>29</sup> Moreover, the ALJ must give

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<sup>25</sup>834 F.2d 161 (10th Cir. 1987).

<sup>26</sup>*Id.* at 164.

<sup>27</sup>*Id.* at 163.

<sup>28</sup>Soc. Sec. Rul. 96-7p, 1996 WL 374186 at \*3.

<sup>29</sup>*Luna*, 834 F.2d at 165-66; *Huston v. Bowen*, 838 F.2d 1125, 1132 (10th Cir. 1988).

specific reasons why she rejects a claimant's subjective complaints.<sup>30</sup> Ultimately, credibility determinations "are peculiarly the province of the finder of fact," and should not be upset if supported by substantial evidence.<sup>31</sup>

A review of the ALJ's decision in this case reveals that she applied some of the factors in *Luna* in assessing plaintiff's credibility. A claimant's daily activities may be considered in determining whether he is able to engage in substantial gainful employment.<sup>32</sup> The ALJ properly considered plaintiff's daily activities; and there was substantial evidence supporting the ALJ's finding that plaintiff's daily activities were inconsistent with total disability. Plaintiff's daily activities included: watching television, reading, working on a computer, preparing meals, and feeding his dogs. Plaintiff lives by himself and does his own shopping, cleaning, dusting, and dishes; he pays his bills and drives; and he occasionally writes fiction.

It was not error for the ALJ to find plaintiff's activities inconsistent with total disability. The ALJ also noted that plaintiff had done some work and attended college classes after his alleged onset date. The ALJ relied on the fact that plaintiff was able to pass his classes, which she thought indicated his ability to concentrate was not significantly impaired, and she believed his ability to attend a class schedule and perform work required a significant RFC, which directly related to his current alleged disability. While neither the work plaintiff did nor his college attendance rose to the level of substantial gainful activity, it was not improper for the ALJ to consider each as factors when

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<sup>30</sup>*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

<sup>31</sup>*Id.* (citing *Kepler*, 68 F.3d at 390-91).

<sup>32</sup>*Talbot v. Heckler*, 814 F.2d 1456, 1462 (10th Cir. 1987).



determining whether plaintiff's complaints of inability to work were credible.<sup>33</sup>

But the ALJ's consideration of other *Luna* factors was not supported by substantial evidence. The ALJ found that there was no objective evidence of fatigue; the physicians' reports and opinions did not demonstrate any ongoing treatment for anything other than his visual problems from Graves' Disease. Yet, the ALJ did not give any weight to the VA's determination that plaintiff was disabled, based on more than just the visual effects of his Graves' Disease. And, the ALJ failed to consider the statement of a third party. Plaintiff's former supervisor stated that plaintiff was less productive than other workers because of his vision problems and because he tired easily, symptoms which became worse over time. The Tenth Circuit has held that the ALJ is not required to make specific written findings regarding each witness's credibility, as long as it is clear from the ALJ's written opinion that she has considered the witness's testimony.<sup>34</sup> Here, the ALJ did not mention the supervisor's statement, and it is not clear that the ALJ even considered it. While some circuits have held that the ALJ need not make a written credibility finding for each witness when the statement could be discredited by the same evidence that discredits plaintiff's testimony,<sup>35</sup> here there was no substantial evidence discrediting plaintiff's complaints of debilitating fatigue. The supervisor's statement is direct evidence from a witness who was able to observe plaintiff on a daily basis. On remand, the ALJ should consider this third party statement when making her credibility determination.

Also, the ALJ stated that plaintiff did not have any side effects from his medication.

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<sup>33</sup>*Markham v. Califano*, 601 F.2d 533, 534 (10th Cir. 1979); *Gay v. Sullivan*, 986 F.2d 1336, 1339 (10th Cir. 1993).

<sup>34</sup>*Adams v. Chater*, 93 F.3d 712, 715 (10th Cir. 1996).

<sup>35</sup>*Lorenzo v. Chater*, 71 F.3d 316 (8th Cir. 1995).

Plaintiff's response on his fatigue questionnaire stated that his Synthroid medication sometimes made him feel jittery or sluggish. The ALJ did not consider this evidence or state why he was discrediting it. On remand, the ALJ must consider and explain the VA's disability determination, and what effect, if any, it has on the ALJ's findings concerning the credibility of plaintiff's complaints of fatigue.

Finally, it appears that the ALJ gave considerable weight to plaintiff's receipt of VA benefits and how that diminished his financial need to return to work. Courts have held that such reliance on outside benefits is not substantial evidence for finding a claimant not credible.<sup>36</sup> This Court is reversing and remanding this case to defendant to consider, examine and explain how the VA disability determination is or is not relevant to the findings underlying defendant's determination of disability. On remand, the ALJ should reconsider whether plaintiff's receipt of disability benefits diminishes his motivation to work, or whether it is his disabilities that diminish his work motivation.<sup>37</sup>

*C. Treating Physicians' Opinions*

Plaintiff further argues that the ALJ erred in the weight she gave to the various opinions of physicians. Three physicians rendered opinions; none were treating physicians. Dr. Majers rendered an opinion, filling out a medical source statement-physical, based on a one time examination of plaintiff and a review of plaintiff's medical records. Dr. Desai also examined plaintiff on one

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<sup>36</sup>See *Stonebraker v. Shalala*, 827 F. Supp. 1531, 1536 (D. Kan. 1993); *Burkett v. Callahan*, 978 F. Supp. 1428, 1431 (D. Kan. 1997).

<sup>37</sup>See *Stonebraker*, 827 F. Supp. at 1536 ("The mere fact that plaintiff has received assistance from other sources, however, says nothing about the reasons plaintiff has remained unemployed, and it is equally probable that a bona fide disability accounts for plaintiff's 'poor motivation' to return to work. The ALJ's circular reasoning cannot support a credibility finding.")

occasion, and another physician filled out an RFC based on Dr. Desai's examination. Dr. Revels, an ophthalmologist, did not examine plaintiff, but rendered an opinion on the basis of his review of plaintiff's medical records. Plaintiff complains that the ALJ did not give sufficient weight to Dr. Majers's opinion, and gave too much weight to the opinions of Dr. Revels and the doctor who filled out the RFC Assessment.

The ALJ must give the most weight to treating physicians' opinions; opinions of physicians who have examined the claimant are given less weight; and opinions of physicians who merely review the claimant's records are to be given the least amount of weight.<sup>38</sup> In addition, the ALJ must consider specific factors when deciding the weight to give any physician's opinion, including the length of the treatment relationship, the frequency of examination, and the extent to which the opinion is supported by objective medical evidence.<sup>39</sup> None of the physicians whose opinions are in issue are treating physicians, so plaintiff argues that Dr. Majers's opinion should have been given the most weight. Although plaintiff claims that the doctor who filled out the RFC Assessment only reviewed the record, it appears that plaintiff was examined by Dr. Desai, and the RFC Assessment was filled out by another physician based on Dr. Desai's examination. As a reviewing physician, Dr. Revels' opinion should have been given the least weight.

It does not appear that the ALJ gave the examining physicians' opinions more weight than the reviewing physician's opinion; and the ALJ did not define nor explain the relative weight he gave to these three opinions. Regarding Dr. Majers's assessment, the ALJ wrote, "The undersigned has reviewed a one-time evaluation identified in the record at Exhibit 10F that does show some

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<sup>38</sup>*Talbot v. Heckler*, 814 F.2d 1456, 1463 (10th Cir. 1987).

<sup>39</sup>*Goatcher v. U.S. Dept. of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995).

limitations but not necessarily consistent with a finding of disability.” Regarding the physician who filled out the RFC Assessment, the ALJ wrote:

In formulating this conclusion, the undersigned has considered the medical source statement completed by a doctor who examined claimant on one occasion which is found at Exhibit 9F. The undersigned finds that evaluation is essentially consistent with the residual functional capacity found herein except for the need to lie down briefly three times a day which could be done during normal work breaks. It should be pointed out that this report is not from a treating doctor but apparently from an examining doctor who saw claimant on one occasion only.

It appears that there was some confusion by the ALJ, in her consideration of these two doctors’ opinions. Dr. Majers’s opinion, which is Exhibit 10F, stated that plaintiff needed to lie down three times a day. The doctor’s opinion labeled Exhibit 9F did not contain such a limitation. Nevertheless, the ALJ determined that plaintiff’s need to lie down could be done during normal work breaks. It appears the ALJ decided this because, although Dr. Majers stated plaintiff could only sit/stand/walk for six hours in an eight hour day, he also stated that plaintiff needed to lie down for at least 15 minutes one time, and needed to lie down for a total of 45 minutes during an eight hour day. The ALJ apparently surmised that plaintiff only needed three 15 minute breaks. The ALJ also found that these breaks could be taken during normal work breaks; but the Court is unable to determine what evidence supports this finding.

In short, the Court directs the ALJ to clarify what evidence she was relying on when weighing the doctors’ opinions, for her discussion of the doctors’ opinions is general and appears to be based on an improper or incomplete review of the record. If the ALJ still determines plaintiff’s need for rest breaks can be accomplished during regular work breaks, the ALJ must support such a determination, identifying the evidence she relies on. On remand, the ALJ must reconsider the physicians’ opinions in light of the weight each should be given and determine the effect that weight

will have on plaintiff's RFC.

*D. ALJ's Determination that Plaintiff Can Return to His Past Relevant Work*

At step four, which is determining plaintiff's ability to return to his past relevant work, the ALJ is required to make the following three findings: 1) determine plaintiff's RFC; 2) determine the physical and mental demands of plaintiff's prior work; and 3) determine plaintiff's ability to return to his past relevant work given his RFC.<sup>40</sup> It is the plaintiff's burden to prove that he cannot return to his past relevant work, but the ALJ retains the duty to inquire and factually develop her decision regarding plaintiff's ability to return to his past work.<sup>41</sup>

Plaintiff agrees that the ALJ made a proper finding of the physical and mental demands of plaintiff's past work, but disagrees with the finding that he can return to his past work as a video store clerk or laundromat operator. Plaintiff contends that the ALJ erred in finding that he retained the RFC for a range of light work, except for the need to lie down three times a day during normal work breaks. Because we find the ALJ's credibility analysis was lacking, the ALJ should reconsider steps one and three and reconsider plaintiff's RFC.

**V. Conclusion**

Therefore, the Court finds that this action should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to conduct further proceedings as follows:

Upon receiving the court's final order of remand, the Appeals Council of the Social Security Administration will remand this case and direct the ALJ to reassess the severity of plaintiff's impairments, in accordance with the statute and regulations, including the evaluation of plaintiff's RFC. The ALJ will further consider the impact

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<sup>40</sup>Soc. Sec. Rul. 82-62, 1982 WL 31386; *see also Henrie v. U.S. Dep't of Health & Human Servs.*, 13 F.3d 359, 361 (10th Cir. 1993); *Winfrey v. Chater*, 92 F.3d 1017, 1023 (10th Cir. 1996) (citing *Henrie* at 361).

<sup>41</sup>*Henrie*, 13 F.3d at 361.

of the disability determination by the Department of Veterans Affairs, the records and opinions of the physicians, and plaintiff's credibility. The ALJ will give specific reasons for her resultant findings. The ALJ will reassess plaintiff's ability to return to his past relevant work after reexamining her conclusions about plaintiff's RFC. If necessary, the ALJ will determine plaintiff's ability to perform a significant amount of jobs in the national economy.

**IT IS THEREFORE ORDERED BY THE COURT THAT** defendant's decision denying plaintiff disability benefits is **REVERSED AND REMANDED** pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further proceedings in accordance with this Memorandum and Order.

**IT IS SO ORDERED.**

Dated this 20<sup>th</sup> day of May, 2004, at Topeka, Kansas.

S/ Julie A. Robinson  
Julie A. Robinson  
United States District Judge